

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JUNE -4 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

ERVIN ALAN MOORE,

Appellant.

)
)
) 2 CA-CR 2007-0219
) DEPARTMENT B

) MEMORANDUM DECISION
) Not for Publication
) Rule 111, Rules of
) the Supreme Court
)
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20051868

Honorable Richard Nichols, Judge

AFFIRMED

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller

Tucson
Attorneys for Appellant

ESPINOSA, Judge.

¶1 Following a jury trial, appellant Ervin Moore was convicted of attempted theft of a means of transportation, third-degree burglary, and resisting arrest. After finding Moore had a prior felony conviction, the trial court imposed concurrent, presumptive, 4.5-year prison terms on the first two counts and a consecutive, presumptive, 1.75-year term on the

third count. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967); *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969); and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), stating he has thoroughly reviewed the record on appeal and has found no meritorious issues to raise. He asks this court to search the entire record for error and directs our attention to three arguable issues. Moore has filed a supplemental brief raising two issues. Finding no error, we affirm.

¶2 Moore filed a motion to preclude the state from introducing at trial an out-of-court identification of him by the state’s main witness. Relying on *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969), he argued that the one-person show up had been unduly suggestive. As a possible arguable issue, counsel suggests the trial court erred by denying Moore’s motion. Moore also raises this issue in his supplemental brief. The state’s witness observed Moore for approximately five to ten minutes at 3:00 a.m. in a well-lit parking lot at the Tucson International Airport. He watched as Moore “opened up the door [of a car] and was [ly]ing on his back under the driver[’s] steering wheel messing around.” The witness saw Moore’s face both as he got in and out of the car and when Moore asked the witness for directions to the freeway as he approached another car and “tried the door handles on it.” Just after the witness reported the incident to the airport police, he was asked to identify Moore, who was handcuffed and seated in a patrol vehicle located six to eight feet away from the witness; Moore was the only non-officer in the vehicle, which was parked in a well-lit area of the airport. The witness testified at the *Dessureault* hearing that he was “100 percent” certain the individual in the patrol car was the same person he had

previously seen in the parking lot and stated that, although another witness had identified Moore along with him, this “didn’t affect [his ability to identify Moore] at all.”

¶3 After conducting a *Dessureault* hearing, the trial court ruled as follows:

The Court finds that the witness had ample opportunity to observe the defendant during the commission of the alleged crime. This was done at close range under good light. The witness was paying attention. The show-up was done within moments of the witness losing sight of the suspect. The show-up was suggestive; however, the witness was certain of his identification which he again made at close range and under good lighting.

[The] Court finds that the . . . out-of-court identification is reliable and admissible, and the Court denies the motion to suppress the out-of-court and in-court identification.

¶4 We will not disturb a trial court’s decision concerning the reliability of an identification absent clear and manifest error. *State v. Atwood*, 171 Ariz. 576, 604, 832 P.2d 593, 621 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717 (2001). In *Manson v. Brathwaite*, 432 U.S. 98, 107-08 (1977), the Supreme Court set forth a two-step analysis for determining whether a defendant has been denied due process because of a potentially suggestive pretrial identification procedure. First, the trial court must determine whether the identification procedure was unnecessarily suggestive. *Id.* If it was, the court must then look at the totality of the circumstances surrounding the identification to determine if it was reliable. *Id.*; *see Neil v. Biggers*, 409 U.S. 188, 200-01 (1972) (test for reliability of witness’s identification includes witness’s opportunity to view defendant at time of crime, degree of attention, accuracy of description, level of certainty at confrontation, and length of time between crime and confrontation). Although we

acknowledge that single-person identifications, such as this one, are inherently suggestive, *see State v. Hicks*, 133 Ariz. 64, 67-68, 649 P.2d 267, 270-71 (1982), there is no due process violation as long as the identification process is sufficiently reliable, *see id.* Based on the evidence presented at the *Dessureault* hearing, we agree the trial court properly concluded the identification process here was sufficiently reliable.

¶5 Counsel next suggests that one of the officers questioned Moore without giving him the *Miranda*¹ warning and advising him of his constitutional rights. It is undisputed that a Tucson Airport Authority Police Department officer questioned Moore before reading him the *Miranda* warning. In response, Moore told the officer that although he had been “looking in” vehicles parked at the airport, he had not been trying to steal anything. However, as counsel has noted on appeal, although Moore filed a motion in limine to suppress “[a]ny statements” he had made to law enforcement officers, he withdrew that motion on the first day of trial. Therefore, having raised but withdrawn this issue below, Moore has waived the right to raise it on appeal. *Cf. State v. Tison*, 129 Ariz. 526, 535, 633 P.2d 335, 344 (1981) (issues concerning suppression of statements made in violation of *Miranda* not raised in trial court waived on appeal).

¶6 The next arguable issue counsel asks us to consider concerns the trial court’s denial of Moore’s motion in limine to preclude “[a]ny mention of any pocketknife found on Mr. Moore.” As counsel concedes, however, Moore subsequently withdrew his objection

¹*Miranda v. Arizona*, 384 U.S. 436 (1966).

to admitting the knife into evidence. Accordingly, he has waived this argument on appeal.
Cf. id.

¶7 Finally, in his supplemental brief, Moore argues the trial court erred by finding he had an historical prior felony conviction for two reasons. He first contends, without argument, that the fingerprints presented at the prior convictions trial did not “conclusively” match his own. The detective who had obtained Moore’s fingerprints in this matter identified him as the individual whose fingerprints she had previously obtained. In addition, a certified fingerprint technician from the Pima County Sheriff’s Department testified that Moore’s fingerprints and those contained in the pen pack submitted as evidence of his prior conviction “were found to be [sic] the same individual,” a conclusion that was reviewed and confirmed by another certified fingerprint technician. The technician testified, however, that the fingerprints on the sentencing minute entry from the prior conviction did not contain sufficient ridge detail to provide a match to Moore’s current fingerprints. Based on the evidence that Moore’s fingerprints conclusively matched those in the pen pack, which was part of a summary report prepared by the Arizona Department of Corrections (DOC) confirming Moore’s prior conviction, we find no error.

¶8 Moore also challenges the fact that his first name, “Ervin,” was spelled as “Irvin” on sentencing documents from the prior conviction, apparently suggesting that he was not the individual named in those documents. However, the summary report prepared by DOC, which contains the fingerprint pen pack the technician positively identified as belonging to Moore, and the attached photographs of Moore, both spelled his name with an

“I” rather than an “E.” Moore does not suggest the photographs do not depict him, despite the incorrect spelling of his name. Nor did he challenge the court’s finding that he had an historical prior felony conviction on this ground below. In addition, as noted on the indictment from his prior conviction, Moore has used various alias names, such as Richard Paul Burnett and Raymond Eugene Lyles, adding further confusion to the accuracy of his name. For all of these reasons, we find the misspelling of Moore’s first name was not significant and determine the trial court properly found Moore had a prior felony conviction for sentence enhancement purposes. We therefore reject Moore’s contention that he is entitled to be resentenced without a prior conviction. Finally, we decline to address Moore’s unsupported comment, presented in the last paragraph of his supplemental brief without any argument whatsoever, that the “security camera footage from the airport,” which he claims no longer exists, would have proved his innocence.

¶9 Pursuant to our obligation under *Anders*, we have reviewed the entire record for error. Having found none, we affirm Moore’s convictions and sentences.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge